

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Names of Claimants

Marc Weitzel,
Josephine Weitzel and
Wilbur Weitzel

and

Case Number 96-01454

Names of Respondents

FirsTier Securities, Inc. n/k/a FBS Investment Services, Inc.
and Jeffrey Einfalt

REPRESENTATION OF PARTIES

Claimants Marc Weitzel, Josephine Weitzel and Wilbur Weitzel were represented by Terrance S. DeWald, Esquire of Koley, Jessen, Daubman & Rupiper, P.C. located in Omaha, Nebraska.

Respondent FirsTier Securities, Inc. n/k/a FBS Investment Services, Inc. was represented by James M. Bausch, Esquire of Cline, Williams, Wright, Johnson & Oldfather located in Lincoln, Nebraska.

Respondent Jeffrey Einfalt was represented by Thomas H. Dahlk, Esquire of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C. located in Omaha, Nebraska.

CASE INFORMATION

The Statement of Claim was filed on or about March 28, 1996.

The Amended Statement of Claim was filed on or about August 14, 1996.

The Submission Agreement of Claimant Marc Weitzel was signed on April 16, 1996.

The Submission Agreement of Claimants Josephine Weitzel and Wilbur Weitzel was signed on July 9, 1996.

The Statement of Answer of Respondent FirsTier Securities, Inc. n/k/a FBS Investment Services, Inc. to the Statement of Claim was filed on or about June 25, 1996.

The Statement of Answer of Respondent FirstTier Securities, Inc. n/k/a FBS Investment Services, Inc. to the Amended Statement of Claim was filed on or about August 23, 1996.

The Submission Agreement of Respondent FirstTier Securities, Inc. n/k/a FBS Investment Services, Inc. was signed on June 24, 1996 by Scott D. Keene, Vice President and Manager.

The Statement of Answer of Respondent Jeffrey Einfalt was filed on or about June 24, 1996.

The Submission Agreement of Respondent Jeffrey Einfalt was executed on July 8, 1996.

HEARING INFORMATION

The hearing was held on the following dates:

- January 28, 1997 for two (2) sessions;
- January 29, 1997 for two (2) sessions;
- January 30, 1997 for three (3) sessions; and
- January 31, 1997 for three (3) sessions.

The hearing was held in: Omaha, Nebraska.

CASE SUMMARY

Claimants Marc Weitzel, Josephine Weitzel and Wilbur Weitzel (hereinafter collectively referred to as "Claimants") alleged that their account executive, respondent Jeffrey A. Einfalt, as a registered representative of respondent FirstTier Securities, Inc., (hereinafter collectively referred to as "Respondents") were liable for damages resulting from reckless and high-risk investment strategies and recommendations that were improper and unsuitable. Claimants made the following legal claims against Respondents: (1) breach of fiduciary duty; (2) common law fraud and intentional misrepresentations; (3) common law negligence, including violation of duties owed Claimants arising out of the breach of (a) NYSE Rule 401 (Good Business Practices), (b) NYSE Rule 405 (Know Your Customer), (c) NYSE Rule 405(2) (Duty to Supervise Account), (d) NYSE Rule 342.16 (Duty to Review Transactions and Supervise Accounts), (e) Article III § 1 of the NASD Rules of Fair Practice (High Standards of Commercial Honor/Equitable Principles of Trade), (f) Article III § 2 of the NASD Rules of Fair Practice (Suitability), (g) Article III § 21(c) of the NASD Rules of Fair Practice (Suitability), (h) Article III § 15(a) of the NASD Rules of Fair Practice, (i) Article III § 27(d) (Duty to Detect and Prevent Irregularities and Abuses), (j) Article III § 35(d)(2) of the NASD Rules of Fair Practice (Puffing or Misrepresentations and Existence of Reasonable Basis for Recommendations), and (k) NYSE Rules 435(1) and 408(c); (4) breach of contract; (5) disgorgement of commissions; (6) violations of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; (7) controlling person liability pursuant to § 20(a) of the Exchange Act of 1933, against respondent FirstTier Securities, Inc. only; and (8) tolling of all

applicable statutes of limitation. Claimants asserted that respondent Jeffrey A. Einfalt's pattern and practice of misconduct in their account included: the recommendation and purchase of unsuitable or high-risk stocks, including penny stocks, stock options, and other high risk investments in light of Claimants' lack of investment experience, stated investment objectives and financial situation; the use of margin to leverage the Claimants' accounts, while increasing the amount of commissions that could be earned, and without explaining the associated risks; misrepresentation of the risks associated with frequently buying and selling the same stocks over and over and lack of diversification; the continuous recommendation of unsuitable, higher risk investments in order to make up for previous losses; the misrepresentation of the quality and associated risk of securities purchased as well as the extent of losses; and the disregard of the rules of FirstTier Securities, Inc. and various self-regulatory agencies, including the NASD.

Respondent FirstTier Securities, Inc. ("FirstTier") denied the allegations set forth in the Statement of Claim. FirstTier stated that all of the purchases and sales of stock executed by respondent Jeffrey A. Einfalt ("Einfalt") for Marc Weitzel's account were specifically directed by Marc Weitzel and were consistent with Marc Weitzel's investment objectives of capital appreciation and speculation as established in his account agreements. FirstTier made the following affirmative defenses: (1) certain claims made by Claimants were barred by the applicable statute of limitations; (2) matters occurring more than six years prior to submission of the Statement of Claim, as amended, were not eligible for submission to arbitration pursuant to § 15 of the Uniform Code of Arbitration; (3) FirstTier acted in good faith and was not subject to control person liability; (4) Claimants' claims were barred by the doctrines of waiver and estoppel; (5) Claimants' claims failed to state a cause of action; (6) Marc Weitzel was not a proper party to make a claim on behalf of Josephine Weitzel and Wilbur Weitzel, and Josephine Weitzel and Wilbur Weitzel had no claim against FirstTier; and (7) the relationship between FirstTier and Claimants was governed by Massachusetts law.

Respondent Einfalt incorporated by reference the Statement of Answer of respondent FirstTier and adopted its positions taken and its affirmative defenses. Einfalt also stated that Marc Weitzel made his own investment decisions, and Marc Weitzel was responsible for any investment losses he may have suffered because of his investment decisions.

RELIEF REQUESTED

Claimants Marc Weitzel, Josephine Weitzel and Wilbur Weitzel requested an award for: actual damages in an amount in excess of \$300,000; disgorgement of all commissions, fees, margin interest charges, and other benefits received by respondents FirstTier Securities, Inc. and Jeffrey A. Einfalt; punitive damages; all costs, including expert witness fees and consulting fees, expenses, and disbursements incurred; attorney fees; and in the alternative, pre-judgment interest at the rate of 12%, pursuant to Nebraska law, from the date of their investments.

Respondent FirstTier Securities, Inc. requested that the claims asserted against it be denied and that it be awarded its costs and attorneys' fees.

Respondent Jeffrey A. Einfalt requested that the claims asserted against him be denied and that he be awarded his costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The claims submitted by Marc Weitzel, Josephine Weitzel and Wilbur Weitzel are hereby denied in their entirety and dismissed with prejudice;
2. The parties shall bear their own costs, including attorneys' fees, except for forum fees specifically addressed below; and
3. Any relief not specifically granted is hereby denied in its entirety.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session. There were ten (10) sessions x \$750 = \$7,500 in forum fees. Pursuant to Section 10332(b) of the Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 10332(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASD Regulation, Inc.") Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants Marc Weitzel, Josephine Weitzel and Wilbur Weitzel.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain in accordance with Section 10333 of the Code the \$350.00 member surcharge previously submitted by Respondent FirstTier Securities, Inc..

In accordance with Section 10332(c) of the Code, Respondent FirstTier Securities, Inc. is hereby liable for and shall pay to Claimants Marc Weitzel, Josephine Weitzel and Wilbur Weitzel the sum

of \$950 as reimbursement of the filing fee and hearing session deposit. Respondent FirstTier Securities, Inc. is hereby liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the sum of \$6,750 in additional forum fees. Fees are payable to the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.

Signed:

Dated:

Richard N. Berkshire, Esquire
Richard N. Berkshire, Esquire
Public Arbitrator, Presiding Chair

February 20, 1997

James R. Baratta
James R. Baratta
Public Arbitrator

February 22, 1997

James A. Ricketts
James A. Ricketts
Industry Arbitrator

February 21, 1997

Date served by the NASD Regulation, Inc.: February 24, 1997

REPORT OF ARBITRATORS

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

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Jeff A. Einfalt

During the course of the hearing in the above referenced matter, the undersigned arbitrators heard testimony and evidence which called into question certain actions by Jeffrey Einfalt including the commingling of funds with the Claimant(s) as a result of opening an account at a different broker dealer and the acceptance of gifts of stock totaling \$50,000 from a third-party client of the brokerage company. The undersigned arbitrators feel that the District Office of the NASD should investigate the matter to determine whether there was a violation of the Rules of Fair Practice.

Signed:

Richard N. Berkshire, Esquire
Richard N. Berkshire, Esquire

James R. Baratta
James R. Baratta

James A. Ricketts
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